July 12, 2000

Mr. Paul C. Sarahan
Litigation Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR2000-2622

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 136989.

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for information regarding the following three companies: Coastal Refining & Marketing, Inc. ("Coastal"), CITGO Refining & Chemicals, Inc. ("CITGO"), and Amerada Hess Corporation ("Amerada Hess"). You state that a portion of the requested information has been released to the requestor, but claim that some of the information is excepted from disclosure under sections 552.103, 552.107, 552.110, and 552.111 of the Government Code. You have submitted a representative sample of the information that you contend is excepted from public disclosure.[1] We have considered the exceptions you claim and reviewed the submitted information.

You claim that the documents contained in attachment B are excepted from public disclosure under Government Code section 552.103. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated,

[1]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). TNRCC must meet both prongs of this test for the information to be excepted under section 552.103(a).

You explain that TNRCC has an enforcement action pending against Coastal, CITGO, and Amerada Hess. You state that although the parties are engaged in settlement discussions, the case is in the litigation process and litigation will occur if no settlement is forthcoming. Based on your representations, and our review of the documents at issue, we find that you have sufficiently shown that litigation involving TNRCC is reasonably anticipated. Moreover, we agree that the representative sample of documents submitted as attachment B pertain to the anticipated litigation.

Once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information and such information must be disclosed. *See* Open Records Decision Nos. 349 (1982), 320 (1982). It appears that an opposing party may have had access to one of the documents contained in attachment B; that document is titled "Agreement Between TNRCC and Participating Facilities, Off-Site Contamination, Corpus Christi Inner Harbor Ship Channel Area." If an opposing party has had access to this document, no section 552.103 interest exists. We therefore address your section 552.111 claim regarding this document. You argue the document is excepted from disclosure under section 552.111 as an interagency memoranda or letter. As discussed more thoroughly below, section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. As stated above, it appears that an opposing party may have had access to this document. Moreover, the document is not an internal communication consisting of advice, recommendations, and opinions, but rather is a document which, as is indicated by its title, is a communication between TNRCC and various facilities setting forth EPA concerns and state and EPA requirements. Therefore, we conclude the document is not excepted from disclosure under section 552.111. In summary, if no opposing party has had access to this document, you may withhold the document pursuant to section 552.103. On the contrary, if an opposing party has had access to the document, you may not withhold it under section 552.103 or section 552.111. For your reference, we have marked the relevant document. TNRCC may withhold the remaining documents in attachment B pursuant to section 552.103. Please note, however, that the applicability of section 552.103(a) ends once the litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You argue that the information submitted as attachment C is excepted from public disclosure under Government Code section 552.107. Section 552.107(1) excepts from disclosure

information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *See* Open Records Decision No. 574 at 5 (1990). When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *See* Open Records Decision No. 574 at 3 (1990). In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We agree that some of the information contained within attachment C is excepted from disclosure under subsection 552.107(1) as confidential client communications or an attorney's legal advice. We have marked the information that TNRCC may withhold pursuant to this section. TNRCC must release the remainder of the information in attachment C.

You claim that the information in attachment D is excepted from public disclosure pursuant to Government Code section 552.110. In accordance with section 552.305 of the Government Code, you notified a representative of Amerada Hess of the current records request and invited Amerada to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(b) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). This office has not received correspondence from Amerada Hess regarding the disclosure of the information. You explain, however, that the information in attachment D has been previously marked as confidential by Amerada Hess, and, therefore, it is TNRCC's policy to maintain the information as confidential pursuant to section 361.037 of the Texas Health and Safety Code. Section 361.037, which pertains to access to hazardous waste records, provides as follows:

> (a) Authorized agents or employees of [TNRCC] have access to and may examine and copy during regular business hours any records pertaining to hazardous waste management and control.
>
> (b) Except as provided by this subsection, records copied under Subsection (a) are public records. If the owner of the records shows to the satisfaction of the executive director that the records would divulge trade secrets if made public, [TNRCC] shall consider the copied records confidential.
>
> (c) Subsection (b) does not require [TNRCC] to consider the

> composition or characteristics of solid waste being processed, stored, disposed of, or otherwise handled to be held confidential.

In interpreting a similar provision under the Texas Clean Air Act--section 382.041 of the Health and Safety Code--this office has ruled that if TNRCC seeks to withhold information from disclosure it must seek a decision from this office in accordance with the Public Information Act. *See* Open Records Decision No. 652 (1997). Further, if the information was identified as confidential when it was submitted to TNRCC, this office will permit withholding the information to the extent a *prima facie* case is made that the information is a "trade secret." *Id.* Section 552.110(a) excepts from disclosure a "trade secret." A "trade secret"

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). Upon careful review of the arguments submitted by TNRCC and the information at issue, we find that there has been no demonstration that the information is trade secret information. Thus, none of the information in attachment D is excepted from disclosure. *See* Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

You claim that the information contained in attachment E is excepted pursuant to Government Code section 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters because disclosure of information relating to such matters will not inhibit

free discussion among agency personnel as to policy issues. *See* Open Records Decision No. 615 at 5 (1993). Additionally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *See id.*

You explain that the submitted documents involve memoranda and email messages that disclose the drafters' opinions and advice regarding the staff's facts and written observations of facts and events. After reviewing the representative documents contained in attachment E, we are unable to determine how the documents relate to TNRCC's policy making functions. Therefore, we conclude that the information is not the type of information excepted by section 552.111. As a result, you must release attachment E to the requestor. Next, you contend that documents submitted in an unlabeled attachment are excepted as attorney work product under section 552.111 or as attorney client privileged information pursuant to section 552.107. Pursuant to section 552.111, a governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. *See* Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *Id.* at 4. We believe you have demonstrated the applicability of both parts of the first prong of the work product test.

As to the second prong of the work product test, in determining whether the information reveals the attorney's mental processes, conclusions, and legal theories, we note that the work product exception generally does not extend to a neutral recital of facts obtained by the attorney. *See* Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n.2 (Tex. 1991)); *see also Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.–Houston [1st Dist.] 1990, no writ) (attorney work product privilege does not protect memoranda prepared by an attorney that contain only a "neutral recital" of facts). However, facts may be excepted from disclosure if they are inextricably intertwined with privileged information. *See, e.g.*, Open Records Decision No. 487 at 4 (1988). After considering your arguments and reviewing the documents at issue, we conclude that the documents do not consist of a neutral recital of facts, but rather reveal the attorney's mental processes and opinions. Therefore, as both prongs of the attorney work product test have been met, we conclude that you may withhold the documents contained in the unlabeled attachment as attorney work product under section 552.111. For your reference, we have marked the relevant attachment.

In summary, with the exception of one document, you may withhold the information

contained in attachment B under section 552.103(a) of the Government Code. The marked document of attachment B may be withheld under 552.103(a) if an opposing party has not had access to the document; otherwise it must be released. Some of the information in attachment C may be withheld under section 552.107(1); the remaining information of this attachment must be released. The information in attachments D and E must be released. The information contained in the unlabeled attachment may be withheld pursuant to section 552.111.

This letter ruling is limited to the particular records at issue in this request and to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Julie Reagan Watson

Julie Reagan Watson
Assistant Attorney General
Open Records Division

JRW/pr

Ref: ID# 136989

Encl. Submitted documents

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